1980

Clarice Dupuis v. Edwin Cyrill Nielson : Respondent'S Brief

Utah Supreme Court

JAMES F. Hawks; Attorney for Appellant Frank N. Karras; Attorney for Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

CLARICE DUPUIS,

Plaintiff-Appellant
and Cross-Respondent,

vs.

EDWIN CYRILL NIELSON,

Defendant-Respondent
and Cross-Appellant.

Case No. 16865

RESPONDENT'S BRIEF

APPEAL FROM VERDICT AND JUDGMENT
OF THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, HONORABLE
ERNEST F. BALDWIN, JR., JUDGE

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STATEMENT OF NATURE OF CASE

This is a personal injury case arising from a rear-end collision involving vehicles driven by appellant and respondent.

DISPOSITION IN LOWER COURT

The case was tried to a jury on November 29 and 20, 1979. At the close of evidence, appellant was granted a directed verdict by the court as to respondent's liability. The jury returned a verdict in favor of appellant for $1,000.00 in general damages, $686.73 in special medical damages and $100.00 for loss of earnings. Subsequent to

trial, appellant made a motion for additur or new trial, claiming that the damage verdict was inadequate. Said motion was denied by the trial court. Further, respondent made a motion for set-off as to reimbursement paid to appellant's insurer for no-fault benefits received by appellant prior to trial. The court granted said motion for set-off as to medical and loss of earnings payments and denied the same as to a set-off against the general damages award for loss of services reimbursement.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order denying appellant's appeal, affirming the damages verdict of the jury and awarding to respondent a set-off against the general damages verdict for reimbursement paid to appellant's insurer for household services payments.

STATEMENT OF FACTS

The issue of liability was sufficiently clear to the court that the court directed a verdict in favor of the appellant and against the respondent at the conclusion of the evidence.

Respondent asserts that appellant's statement of facts concerning testimony as to appellant's alleged injuries, course of medical treatment and alleged expenses both medicals and lost wages, is misleading in that the appellant makes reference to medical treatment by Dr. Isaacson, Dr. Jean Wayman, chiropractor, medical testimony

by Dr. Thomas Soderberg and physical therapy by Larry Brown, R.P.T. Also appellant has made reference to statements made by various doctors and other persons giving medical treatment. Appellant has referred to the treatment given and doctors who have allegedly treated the appellant, when at the time of trial appellant failed to produce the chiropractor, Dr. Jean Wayman, the physical therapist, Larry Brown or Dr. Isaacson and produced only Dr. Thomas Soderberg. Dr. Soderberg first saw the appellant eight months after the accident and saw her only twice on August 9, 1978 and again on August 23, 1978. Appellant was then not seen again by Dr. Soderberg for over a year, until the 22nd day of September, 1979.

Appellant produced no testimony from a doctor indicating that the appellant could not work because of injuries sustained as a result of the accident. The only testimony to this fact was the testimony of the appellant. Appellant further testified that during this period of time she was having emotional problems arising from a divorce, that she had remarried and that her husband had had a heart attack, requiring her to leave the area.

The evidence, primarily the medical records of Dr. Soderberg, illustrate the personal problems not related to the accident which the appellant had. Said problems are pointed out in the medical records of Dr. Soderberg dated November 7, 1979. It is stated therein that the appellant was

having tension because her husband had disappeared and had not been found for a week.

The testimony at the time of trial further showed that the appellant was being treated simultaneously by the chiropractor, Dr. Jean Wayman, and by Dr. Soderberg. Dr. Soderberg was not aware that the appellant was receiving chiropractic treatments at the same time that she was receiving physical therapy treatments at the request of Dr. Soderberg. On some occasions the appellant received physical thereapy and chiropratic treatments on the same day or within a day or so of each other.

The jury returned a verdict for general damages consistent with the testimony of the appellant and Dr. Thomas Soderberg.

ARGUMENT

POINT I

NEITHER ADDITUR NOR NEW TRIAL IS APPROPRIATE IN APPELLANT'S CASE

Respondent does not challenge the assertion by appellant that this court, in appropriate circumstances, may order additur contingent upon acceptance by a defendant or, alternatively, the granting of a new trial. Such was the order of the Supreme Court of Utah in Bodon v. Suhrmann, 8 Utah 2d. 35, 327 P.2d 826 (1958), relied upon by the appellant.

However, the circumstances warranting additur are narrowly drawn. Additur or a new trial is proper only when

the damage award is inadequate due to having been arrived at by the jury under influence of passion or prejudice or when the evidence is insufficient to support the verdict or the verdict is against the law.

No claim is made by appellant, nor could one be sustained, that the verdict herein was inadequate because the jury acted under the influence of passion or prejudice. Nor was the verdict against prevailing law.

The only basis for challenging the damages award herein is that the evidence is insufficient to support the verdict, or, to more clearly state the proposition proffered by appellant, that the verdict is inadequate in light of the evidence presented as to damages.

Consequently, this court is asked to consider the weight to be accorded the verdict of a jury which was fully apprised of the evidence as to damages sustained by the appellant and which was arrived at on the basis of proper instructions.

In the case of Jensen v. Eakins, 575 P.2d 179 (1978), plaintiff appealed from a jury verdict, claiming the damage award was inadequate. The Utah Supreme Court, in affirming the amount of the award stated:

> "The award of damages may be less than the plaintiff wished or even less than we would have found had we been the jury; but it is the prerogative of the jury to make the determination of damages and we cannot substitute our judgment for that of the fact finder unless the

> evidence compels a finding that reasonable men and women would, of necessity, come to a different conclusion." 575 P.2d at 180

Similarly, in the case of Schneider v. Suhrmann, 8 Utah 2d 35, 327 P.2d 822, (1958), a companion case to Bodon v. Suhrmann, supra, the Utah Supreme Court stated:

> "Cases dealing with the review of damages found by a jury, with invariable consistency, recite the reluctance of courts to interfere with such verdicts if there is any reasonable basis in the evidence upon which they can be sustained. This is based partly upon the often referred to advantages the fact trier has in being in immediate contact with the trial, the parties and the witnesses. In addition thereto, the question of damages for personal injuries involving the intangibles of pain and suffering, with respect to which reasonable minds are apt to differ greatly, are matters which a jury is peculiarly adapted to determine. 327 P.2d at 825

The court in Schneider then affirmed the jury verdict awarding the plaintiff $2,000.00 general damages as a result of contracting trichinosis from sausage sold by the defendant.

The law does not contemplate upsetting a jury verdict merely because the plaintiff's expectation as to the appropriate award of damages is not fulfilled. The jury is and should be entitled to give whatever weight it chooses to the plaintiff's evidence as to the extent of injury and reasonableness of the claims concerning medical treatment and loss of earnings.

The jury verdict in the instant case may be set aside only if this court concludes that reasonable minds would, of necessity, have differed from the jury in this case in their conclusion as to the proper amount of damages to be awarded.

Respondent asserts that the verdict awarding appellant $1,000.00 general damages, $686.73 in medicals and $100.00 loss of earnings is well within the range of reasonableness. Appellant is not entitled to any presumption that the jury accept appellant's evidence as to damages nor as to the credibility of appellant's witnesses. In fact, the only direct medical evidence produced by appellant was the testimony of Dr. Soderberg who first treated appellant some eight months after the accident. The balance of appellant's evidence as to medical treatment, medical expenses and lost wages was in the form of self-serving declarations by appellant and hearsay statements of physicians and physical therapists.

Respondent urges the court to deny appellant's request for additur or in the alternative, for a new trial.

POINT II

RESPONDENT IS ENTITLED TO A SET-OFF FOR HOUSEHOLD SERVICES PAYMENTS PAID TO APPELLANT

Section 31-41-11 (a), Utah Code Annotated (1953), requires that a defendant's insurer reimburse a plaintiff's insurer for any no-fault benefits paid to plaintiff pursuant

to the Utah Automobile No-Fault Insurance Act. Further, subsection (b) of the same statute provides for binding arbitration between insurers to settle the amount of such reimbursement.

In the case before the court, respondent's insurer prior to trial paid to appellant's insurer the sum of $494.09 as medical expenses, $1,200.00 for loss of earnings and $708.00 for loss of household services. Those sums represented the amounts paid by appellant's insurer as no-fault benefits and were accepted as reimbursement of same by said insurer. The jury verdict herein awarded the plaintiff the sum of $1,000.00 in general damages, $686.73 as special damages for medical expenses and the sum of $100.00 as special damages for loss of earnings. The trial court, at respondent's request, awarded a set-off for the medical payments reimbursement and loss of earnings reimbursement, leaving a balance due appellant of $192.64 for special medical damages. The court refused to award respondent a set-off against the general damages verdict for the $708.00 reimbursement paid by respondent's insurer to appellant's insurer for no-fault household services payments to appellant.

Respondent contends that the language of Section 31-41-11, Utah Code Annotated (1953), mandates a set-off against appellant's verdict for all amounts paid by respondent's insurer as reimbursement of personal injury

protection benefits paid to appellant, including the household services payments.

The clear intent of the Utah No-Fault Act is to provide for reimbursement of losses, but not to allow a double recovery for those losses by a plaintiff who accepts no-fault benefits and attempts to claim in addition thereto any corresponding sums awarded by jury verdict.

The Utah Supreme Court dealt with the effect of the Utah No-Fault Act in connection with claims for no-fault benefits in the case of Jones v. Transamerica Insurance Company, 592 P.2d 609 (1979). In that case, plaintiff was paid by his insurer the sum of $365.63 in medical expenses and $567.89 in disability benefits. Some eighteen months later, plaintiff submitted additional claims for payment for loss of services of $4,380.00 and for loss of earnings of $2,485.36. Defendant Transamerica Insurance Company refused to pay those claims and, in the meantime, plaintiff settled with the tortfeasor for the sum of $6,000.00. Plaintiff then brought suit against Transamerica Insurance Company for the subsequent amounts claimed for loss of services and earnings. The Utah Supreme Court, in affirming the summary judgment of the trial court denying plaintiff's claims for additional payment stated that the no-fault act was designed to eliminate small injury claims by providing automatic payment and further:

> "No-fault benefits are also available to those who sustain greater

> injuries. This is so even though they remain free to pursue a tort claim as well. However, this does not entitle one to a double recovery for a single loss since the statute specifically affords subrogation rights and arbitration between the insurers whenever no-fault benefits are paid.
>
> "A fortiori, the legislative intent specifically expressed in the Act itself to 'possible stablize, if not effectuate certain savings in, the rising costs of automobile accident insurance and to effectuate a more efficient, equitable method of handling the greater bulk of the personal injury claims that arise out of automobile accidents' negatives the contention that double recovery is permitted. Double recovery for a single item of loss was never contemplated by the legislature and we will not permit any type of automatic reward or 'windfall' to an injured plaintiff. 592 P.2d at 611.

Under the rationale of Jones, supra, defendant is entitled to a set-off against the jury verdict for the $708.00 paid as reimbursement for loss of household services as well as for the medical expense and loss of earnings payments.

Further, the holding of this court in Allstate v. Ivie, 606 P.2d 1197 (1980), that a tort-victim's recovery from the liability insurer cannot be reduced by the amount of no-fault benefits paid has no application in the instant case, inasmuch as, prior to trial herein, appellant's insurer received full reimbursement for household services payments made to appellant and appellant presented evidence at trial

as to loss of household services, seeking to recover for the same. In Ivie, supra, the court found that an injured party should plead only for those damages for which he has received no reparation under his no-fault insurance.

By virtue of the decisions in Jones, supra, and Ivie, supra, the no-fault act prohibits double recovery of any amounts payable under the act, including loss of household services. Since the only source available in this case for setting off the loss of services payments is the general damages award, respondent is entitled to a credit against that award in the sum of $708.00, representing the amount paid by respondent's insurer to appellant's insurer.

Appellant should be barred from recovering any sum from respondent which is duplicative of payments accepted by appellant's insurer as reimbursement for no-fault benefits.

DATED this 6th day of June, 1980.

FRANK N. KARRAS
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MAILING CERTIFICATE

I hereby certify that I mailed two (2) copies of the foregoing Respondent's Brief to James E. Hawkes, Attorney for Plaintiff-Appellant, 301 Bump & Ayers Building, 2120 South 1300 East, Salt Lake City, Utah 84106, this 6th day of June, 1980.